In The

Supreme Court of the United States

October Term, 1955

No. 642

Students Book Company, *Petitioner,*

v.

Washington Law Book Company, *Respondent.*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

Questions Presented

Of the medley of questions presented by Petitioner only two appear to merit consideration: (1) whether certain instructions of the trial judge were erroneous; (2) whether a dissenting judge can validly write the 2 to 1 opinion of the Appellate Court.

Counter-Statement of the Case

Petitioner sued for treble damages under the Robinson-Patman Act, 15 U.S.C. Sec. 13(a) alleging a 20% discount to competitors as against a 6% discount to Petitioner. The proof showed that in 1947 the Defendant, a retailer of law books, decided in addition to selling over-the-counter, to concentrate on a consignment method of doing business by selling student law books through campus

book stores which acted as consignment agents.[1] All purchasers, whether making their purchases at the retail store on 13th Street, or through one of the consignment agents, paid the list price. No price advantage was realized by anyone. The campus stores received a commission of 20% of the list price for handling and merchandizing the books. (J.A. 131) Invoices to the campus stores were clearly stamped "Consignment," and the consignment agents rendered periodic reports to Washington Law Book Company, the consignor, on forms printed for that purpose by the Washington Law Book Company. (e. g. J. A. 198-214, Defendant's Exhibits Nos. 7A and 7B). Periodically respondent took back the unsold books.

The present suit is based on Petitioner's claim that the foregoing constitutes a violation of 15 U.S.C. 13(a). Respondent showed its deliveries of books to be consignments and not sales and that petitioner's loss of trade principally stemmed from George Washington University's action in opening its own convenient book store in 1951 in University owned facilities and staffed by University personnel, and selling books on its own campus, as did all other campus-consignees, at the same prices charged by petitioner. There was neither claim nor proof that the consignment agents, the campus book stores, ever

---

[1] Petitioner, in its Statement, p. 3, intimates that Petitioner alone was terminated as a consignment agent in 1947. This is incorrect. All previous consignment arrangements with all persons, except campus book stores, were terminated. (J.A. 32,34). Thus, there was no discrimination against Petitioner.

Petitioner is likewise incorrect in its recital, at p. 3 of its Statement, that "In 1949, American's book store began obtaining the books from Respondent at 20% below list price, with the full right of return of all unsold books." Petitioner fails to state that Washington College of Law, upon becoming a part of American University in 1949, became eligible to participate in the consignment arrangement which had been in existence between American University and Washington Law Book Company "for a long time prior to 1949." (J. A. 14)

sold at prices below petitioner's nor that these agents sold to the public or to anyone but their own students. Hence, there was no proof of loss of sales by petitioner and no proof of damage traceable to the alleged discriminatory practices.

ARGUMENT

A. The General Verdict Is Decisive That the Transactions Were Consignments:

Petitioner appears to argue that consignment transactions are sales to purchasers for resale under 15 *U.S.C.* Sec. 13(a). On principle it seems obvious that when A makes B his agent and delivers goods to him on consignment B is not the "purchaser" of these goods for "resale". Hence, by its very terms, the Act is inapplicable. Petitioner's vague language as to whether there was a "valid" consignment (Pet. p. 2) and as to whether "Robinson-Patman can be ignored so long as the seller merely rubber-stamps "Consignment" on his invoices (Pet. p. 5) merely means that he contends there was no real consignment, in truth and in fact. This question was clearly submitted to the jury by careful instructions (Op. below p. 4 footnote 7). The jury found against Petitioner and as its verdict was a general one it must be assumed to have decided, upon proper evidence,[2] that the transactions were in fact consignments and not cloaks for purchases as to which there was no evidence.

B. The Instructions Were Properly Denied:

The only questions legitimately open for review are whether the Court erred in denying two instructions re-

---

[2] As Petitioner did not move for a directed verdict he cannot complain of the weight of the evidence or that the verdict is not supported by the evidence (See *Zimmerman* v. *Emmons*, 225 F. (2) 97,99, cert. den. and cases collected in footnote 10.)

quested by Petitioner. The majority of the Court below was of the opinion that the first instruction (Pl. Req. No. 3, Op. below p. 6) as to how the consignment agents treated their sales under the District of Columbia Sales Tax law was too involved and obscure. The dissenting Judge felt that the way in which the consignment agents regarded the transactions as evidenced by their obtaining under the D. C. Sales Tax Law resellers exemption certificates covering sales of books for Respondent might throw some light on the question of whether the transactions were consignments or sales (Op. Below, p. 10). However, there was no evidence that Respondent was advised of their consignment agent's acts in filing the District of Columbia Sales Tax returns and referring to themselves therein as "resellers" nor as to why they did so, which was, no doubt, to avoid tax.[3] In any event the campus bookstores' opinion of the meaning of a word of art used in a tax statute is clearly of no probative value insofar as third parties are concerned.

Two members of the Court below felt that the second requested instruction was unnecessary, having already been covered by the general charge. (Op. below p. 7) The dissenting Judge below disagreed.

The second requested instruction read as follows:

"Plaintiff's Request No. 5.

"There has been testimony by Defendant that it did not sell books to some of the college stores, but merely consigned them. Now it is for you to determine whether in truth, those were sales or consignments. There were no contracts between those parties so you must judge from the manner in which the arrangement operated. 'The term "consign" . . . may express the true state of the case . . . or it may

[3] The undenied testimony of George Washington was that it paid the Sales Tax as the agent of Respondent.

be a mere subterfuge, and if it be the latter, there is no magic in that word which can take from the transaction its real character.' (1 Mechem on Sales 43; Butterick v. F.T.C., 1925, CCA II ,4 F. 2d 910; Standard Patterns v. Magrane-Huston, 1922, 258 U.S. 346; in re Wells, D. C. Penn. 140 F. 752." (Op. below p. 6)

The majority below felt that the Court's general instructions recited in footnote 7, pp. 4 and 5 of the Opinion below, adequately told the jury that:

> "they were to decide whether the transactions were sales or consignments upon the whole evidence, without giving undue weight to the fact that the parties to the transactions sometimes used the word "consign." (Op. below p. 7)

The dissenting Judge, however, felt that the above instruction should have been given. He stated the evidence likewise was susceptible of the view that the consignment transactions were in fact conditional sales or "sale or return" arrangements in which "title passes to the purchaser subject to his option to return the property within a specified or a reasonable time." (Op. below, p. 7)

It is sufficient, we think, to point out that no such instruction was ever reque ted by petitioner;[1] certainly the theory of a conditional sale or "sale or return arrangements" is not revealed by Plaintiff's Request #5 above quoted. The case was not tried on any theory of conditional sale or sale-or-return arrangements tho the trial court instructed the jury as to the return privilege and

[1] The dissenting Judge states:

> "The instructions requested by the plaintiff and denied by the trial court do not, of course, articulate all the foregoing criteria applicable to the jury's consideration of the evidence. But they do supply some of the much needed elaboration which I have described. (Op. Below p. 9)

that it was not conclusive one way or the other (Op. below p. 5, footnote). The requested instruction adds nothing to what the Court charged. (Op. below, p. 4-5 footnote 7.)

C. The Form of the Opinion Below Presents No Error:

Petitioner asks review based on the form of the Opinion below. Petitioner states:

> "We have a situation almost unique in appellate proceedings: The only opinion is that of the judge who felt the trial court committed substantial error and that a new trial should be granted. (App. 6a) His colleagues, who comprised the 2-1 majority for affirmance, said nothing." (P. 4, Petition)

We submit the case is simply that of a 2 to 1 affirmance. This is proved by the judgment below which states:

> **"JUDGMENT**
>
> This cause came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.
>
> On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed. Dated December 1, 1955.
>
> Per Curiam
>
> Circuit Judge Bazelon is of the view that a new trial should be awarded for the reasons stated in the opinion in this case."

There is nothing to require an appellate court to write an opinion and there is nothing which prevents an appellate court voicing its 2 to 1 opinion through a dissenting judge. This court did so in *Helvering* v. *Davis* 301 U. S. 619, 639 and in *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562. In the latter case, the late Justice Jackson wrote the

opinion of this court but then filed a separate opinion of his own which he referred to as a dissent. (Op. p. 575). He stated:

> "It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions. Mr. Justice Cardozo taught us how Justices may write for the Court and still reserve their own positions, though overruled. *Helvering* v. *Davis,* 301 U. S. 619, 639."

A recent precedent (in part) in the United States Court of Appeals for the District of Columbia is *Eastern Air Lines* v. *Union Trust Co.* 221 F. (2d) 62, 80, reversed on other grounds, 100 L. Ed. 125. As courts review judgments, not opinions, there is no substance to the present claim of error.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
BEN IVAN MELNICOFF
Bowen Building,
Washington 5, D. C.
Counsel for Respondent.